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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

OMAR MONTANO,

Defendant and Appellant.

B208767

(Los Angeles County
Super. Ct. No. BA301136)

APPEAL from a judgment of the Superior Court of Los Angeles County, William R. Pounders, Judge. Modified and, as modified, affirmed with directions.

Lynda A. Romero, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Lance E. Winters, Deputy Attorneys General, for Plaintiff and Respondent.

Omar Montano appeals from the judgment entered following his conviction by jury of first degree murder (Pen. Code, § 187, subd. (a)) with firearm use (Pen. Code, § 12022.53, subd. (b)) and committed for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)), with a special circumstance finding of witness killing (Pen. Code, 190.2, subd. (a)(10)). The court sentenced appellant to prison for life without the possibility of parole, plus 10 years. We modify the judgment and, as modified, affirm it.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that on May 14, 2005, Miguel De La Torre and Daniela Quintero were with De La Torre's friends at Vineland and Saticoy. Quintero was the mother of De La Torre's son. Quintero saw a car drive by with someone pointing a gun out the window, laughing, and saying something about "Vineland." Later, two men approached and fired shots. De La Torre was shot and was hospitalized for about three months. Quintero believed the two men were affiliated with the Vineland Boys gang.

Los Angeles Police Detective Martin Pinner investigated the shooting and determined that Edgar Delgado and Antonio Padilla, both Vineland Boys gang members, were involved. Accordingly, Delgado and Padilla were arrested and charged with, inter alia, four counts of attempted murder, with firearm and gang allegations. Police arrested Delgado and Padilla during about the last week of May 2005.

After De La Torre was released from the hospital, he returned home where he lived with Quintero on Vineland, about three blocks from the location of the May 2005 shooting. Pinner interviewed De La Torre soon after his release from the hospital. Pinner and De La Torre eventually spoke about the shooting several times. De La Torre indicated he thought the Vineland Boys gang was involved in the shooting, and he identified a vehicle involved in the crime. On March 8, 2006, De La Torre attended a corporeal lineup.

On March 15, 2006, De La Torre went to the police station and spoke with Pinner. Pinner talked with De La Torre about the fact that De La Torre was a witness in the case

arising from the May 2005 shooting and would be called to testify. De La Torre never identified anyone involved in the shooting. De La Torre, crying, said he was concerned about the Vineland gang. Within hours, De La Torre would be dead.

Jose Ramirez was appellant's cousin. Appellant claimed to be a member of the Vineland Boys gang, and he lived in the area claimed by the gang. On March 15, 2006, Ramirez, who lived near Vineland and Valerio, was with appellant and appellant's friends outside the building where Ramirez lived. Appellant was with about 13 other males, and had a gun. Jesus Quiroz and his girlfriend, who lived at the location, were a few feet from appellant. While Quiroz was sitting with his girlfriend, appellant said, " 'Fuck them, fuck [Wanderers][.]' "

Appellant later went towards a liquor store. De La Torre and two of his friends were standing outside a laundromat next to the store. Appellant asked if De La Torre was from Westside Wanderers. De La Torre said he was from nowhere. At some point, appellant said, "Vineland Boys."

Appellant said his homies wanted to talk to De La Torre. De La Torre said that if appellant's homies wanted to talk to De La Torre, they could come and look for him. Appellant's hands were in his pockets. Appellant replied that, either way, De La Torre was going to walk.

Appellant pulled out a gun and threatened to kill De La Torre and his two friends if they did not walk. The three complied, escorted by appellant. Appellant later told De La Torre's friends to go back, and the two walked away. Appellant told De La Torre to look at appellant's face. De La Torre said, "Oh, fuck[.]" Appellant fired shots, and one of the bullets struck De La Torre, killing him.

Sometime after appellant murdered De La Torre, Delgado and Padilla were convicted in their separate criminal case. Delgado and Padilla remained in custody at all times after about the last week of May 2005, including when, and after, they were convicted. Gang members in jail sometimes possessed police reports. On April 12, 2006, police recovered from the jail cells of Delgado and Padilla documents relating to the May 2005 shooting of De La Torre.

Ramirez testified as follows. On the Saturday following the March 2006 shooting, appellant said he shot “the guy” for “being a rat or something like that.” A rat was “like saying things that you’re not supposed to be saying, like in court saying stuff.” (*Sic.*) A rat was a snitch. Appellant did not say anything about court or that the person whom appellant shot was going to court.

Ramirez later testified that, a couple of days after the March 2006 shooting, appellant told Ramirez that appellant shot the victim because the victim was a rat. Ramirez denied that appellant explained how the victim was a rat. However, after Ramirez read a portion of the preliminary hearing transcript, the prosecutor asked if it refreshed Ramirez’s memory about whether appellant had told Ramirez what appellant meant about “being a rat.” Ramirez replied, “Yes. Because a rat being in court, saying -- testifying against other people.” (*Sic.*) Ramirez also testified that appellant said something to explain why the victim was a rat, namely, “because [De La Torre] was being in court testifying in another case, I think.”

Los Angeles Police Officer Claude Guiral, a gang expert, testified at trial as follows. The area where the killing occurred was in Vineland Boys gang territory. Appellant was a Vineland Boys gang member, and De La Torre was a member of the Wanderers gang. Gangs considered it disrespectful to snitch. Talking to police about a crime or testifying in court against a fellow gang member was snitching. People could be killed for snitching. It was important that gang members retaliate against persons who snitched, in part to prevent the incarceration of their gang’s members. A person who cooperated with police and who went to a corporeal lineup would be considered a rat.

Guiral also testified that the murder in the present case was done in furtherance of the Vineland Boys gang and, in part, to prevent De La Torre from cooperating with authorities to obtain a conviction on an unrelated charge. In defense, appellant presented evidence that he was misidentified.

CONTENTIONS

Appellant claims (1) there is insufficient evidence to support the witness killing special circumstance finding, (2) the prosecutor committed misconduct, and (3) appellant is entitled to additional precommitment credit.

DISCUSSION

1. Sufficient Evidence Supported the Witness Killing Special Circumstance Finding.

The jury convicted appellant as previously indicated.¹ Appellant claims there is insufficient evidence to support the witness killing special circumstance finding. We disagree.

Penal Code section 190.2, subdivision (a)(10), states, in relevant part: “(a) The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found . . . to be true: [¶] . . . [¶] (10) The victim was a witness to a crime who was intentionally killed *for the purpose of preventing his or her testimony* in any criminal or juvenile proceeding, and the killing was not committed during the commission or attempted commission, of the crime to which he or she was a witness; or the victim was a witness to a crime and was intentionally killed *in retaliation for his or her testimony* in any criminal or juvenile proceeding. . . .” (Italics added.)

As the court stated in *People v. Bolter* (2001) 90 Cal.App.4th 240, 244, “. . . [Penal Code section 190.2, subdivision (a)(10)] can be violated in two ways. The accused can kill a witness to a crime (1) to prevent him or her from testifying, or (2) in retaliation for his or her testimony.”

Appellant does not dispute the sufficiency of the evidence that he committed the willful, deliberate, and premeditated murder of De La Torre with firearm use and for the

¹ Although the information alleged that appellant personally and intentionally discharged a firearm (Pen. Code, § 12022.53, subd. (c)), and personally and intentionally discharged a firearm causing great bodily injury or death (Pen. Code, § 12022.53, subd. (d)), the jury made no findings as to these allegations.

benefit of a criminal street gang. Nor is there any dispute that appellant satisfied the elements of Penal Code section 190.2, subdivision (a)(10), except as to the issues of whether, when he murdered De La Torre, appellant did so for “the purpose of preventing,” or “in retaliation for,” De La Torre’s testimony. The remaining issue is whether appellant murdered with either of these mental states. Our power as an appellate court begins and ends with the determination of whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, to support the trial court’s implied finding that appellant entertained the requisite mental state. (Cf. *People v. Hernandez* (1990) 219 Cal.App.3d 1177, 1181-1182.)

There was substantial evidence as follows. Delgado and Padilla, members of the Vineland Boys gang, were involved in the May 2005 shooting of De La Torre. During about the last week of May 2005, police arrested Delgado and Padilla in connection with the shooting. The shooting resulted in a criminal case against Delgado and Padilla which was still pending when appellant murdered De La Torre on March 15, 2006. Delgado and Padilla remained in custody from the date of their arrest to March 15, 2006, remained in custody after the murder of De La Torre, and police found in their jail cells documents relating to the May 2005 shooting of De La Torre. Pinner and De La Torre had discussed the May 2005 shooting several times. De La Torre indicated he thought the Vineland Boys gang was involved in the shooting, and he identified a vehicle involved in the crime. A week before appellant murdered De La Torre, the latter attended a corporeal lineup. Appellant lived in the area claimed by the Vineland Boys gang.

On March 15, 2006, De La Torre went to the police station and Pinner talked with him about the fact that De La Torre would be called to testify in the May 2005 shooting case. De La Torre, crying, said he was concerned about the Vineland gang. His cry was prophetic--within hours he was murdered by appellant, a Vineland Boys gang member.

On March 15, 2006, appellant, a Vineland Boys gang member, demonstrated animosity towards members of the Wanderers gang when appellant was with Quiroz. De La Torre was a member of the Wanderers gang. Appellant confronted De La Torre at the laundromat, asked if De La Torre was from the Westside Wanderers, De La Torre

replied that he was from nowhere, and appellant at some point said Vineland Boys. Appellant also said his homies wanted to talk to De La Torre, and appellant eventually threatened to kill De La Torre if he did not go with appellant. Although De La Torre complied, appellant later told De La Torre to look at appellant's face, then murdered him.

Appellant indicated to Ramirez that appellant shot De La Torre for being a rat. One meaning of the word "rat" is "informer" (Webster's 3d New Internat. Dict. (1961) p. 1884), and one meaning of the word "informer" is "one that informs a magistrate of a violation of law[.]" (*Id.* at p. 1160.) Another meaning of the word "informer" is "a person who . . . gives evidence of the guilt of, another." (Webster's New World Dict. (College ed. 1968) p. 750.)

Ramirez indicated that, by the term "rat," appellant meant a person "in court . . . testifying" against others. Ramirez also indicated appellant explained why De La Torre was a rat, i.e., because appellant was "in court testifying in another case[.]"

Ramirez's testimony reflects that appellant frequently used present participles when talking with Ramirez about why appellant shot De La Torre. Thus, Ramirez testified as follows. Appellant said he shot the guy for "*being* a rat or something like that." (Italics added.) A rat was like "*saying* things that you're not supposed to be *saying*, like in court, *saying* stuff." Ramirez's memory was refreshed about whether appellant told Ramirez what appellant meant about "*being* a rat," (italics added) namely, "*being* in court *saying* -- *testifying* against other people." (*Sic.*) Appellant said something to explain why De La Torre was a rat, namely, "because [De La Torre] was *being* in court *testifying* in another case[.]"

Appellant's usage of present participles provided evidence that on or about the day that appellant shot De La Torre, he was currently testifying in a case. De La Torre obviously was not in court when he was shot. Appellant's statements to Ramirez provided evidence that De La Torre recently had testified, and would have testified in the near future except for the fact that appellant murdered him.

Guiral testified that it was important that gang members retaliate against persons who snitched, in part to prevent the incarceration of their members. This testimony

provided evidence that gang members retaliated to prevent persons from testifying, since testimony might lead to incarceration. Guiral testified not only that the murder of De La Torre was done in furtherance of the Vineland Boys gang but, in part, to prevent De La Torre from cooperating with authorities to obtain a conviction on an unrelated charge. This testimony provided evidence that appellant murdered De La Torre to prevent him from testifying since, absent a guilty plea, testimony was required to obtain a conviction.

There was sufficient evidence to support the Penal Code section 190.2, subdivision (a)(10) witness killing finding, including sufficient evidence that appellant killed De La Torre for “the purpose of preventing,” and “in retaliation for,” De La Torre’s testimony in a criminal proceeding, i.e., the criminal proceeding arising from the 2005 shooting of De La Torre. (Cf. *People v. Ochoa*, *supra*, 6 Cal.4th at p. 1206; Pen. Code, § 190.2, subd. (a)(10).)

None of appellant’s arguments compel a contrary conclusion. In particular, insofar as the mental state of “the purpose of preventing his . . . testimony” is concerned, whether appellant knew De La Torre would testify in the future is not dispositive. “ ‘ . . . “Intent includes those consequences which (a) represent the very *purpose* for which an act is done (*regardless of the likelihood of occurrence*), or (b) are known to be substantially certain to result (regardless of desire).” ’ [Citation.]” (*People v. Colantuono* (1994) 7 Cal.4th 206, 217, italics added.) On this record, the jury reasonably could have concluded that appellant had the requisite purpose to prevent De La Torre from testifying, whether or not (1) De La Torre would in fact testify in the future or (2) appellant knew De La Torre would so testify. Moreover, the jury reasonably could have concluded that appellant killed De La Torre “in retaliation for” past testimony.

Further, the fact that the jury failed to make findings as to the Penal Code section 12022.53, subdivision (c) and subdivision (d) allegations did not demonstrate that appellant lacked the requisite intent since, as respondent notes, the jury may have failed to make the findings merely as a matter of leniency. (Cf. *People v. York* (1992) 11 Cal.App.4th 1506, 1510.)

2. *No Prosecutorial Misconduct Occurred.*

a. *The Prosecutor's Comment Concerning Consciousness of Guilt.*

(1) *Pertinent Facts.*

Evidence was presented at trial that appellant was wearing a hooded sweatshirt when he confronted De La Torre on March 15, 2006. On April 12, 2006, police searched appellant's home, recovered a hooded sweatshirt, and arrested him. Los Angeles Police Detective Michael Oppelt denied that he submitted the recovered sweatshirt for gunshot residue testing. Oppelt indicated he was told that, because of the passage of time, a gunshot residue test would not be performed because, inter alia, the sweatshirt might have been laundered.

During cross-examination by appellant, appellant asked if Oppelt asked if the sweatshirt had been laundered. Oppelt denied he had asked and indicated appellant would not talk to Oppelt. Appellant objected and made a motion to strike. The court sustained the objection and granted the motion.

During opening argument, the prosecutor argued Ramirez was willing to talk with police because he lacked consciousness of guilt. The prosecutor also commented, "A person with a consciousness of guilt when confronted with the police in that situation might say I don't want to talk."

Appellant objected on an unspecified ground. At sidebar, appellant commented, "I think this is bordering Griffin error[.]" Appellant argued that in light of Oppelt's earlier testimony that appellant would not talk with Oppelt, the prosecutor was, by his argument, commenting on appellant's failure to talk with Oppelt. Appellant moved for a mistrial.

The prosecutor denied he was talking about the fact that appellant would not talk with Oppelt, and the prosecutor indicated he was only commenting about Ramirez's willingness to talk with Oppelt. The prosecutor noted Oppelt's testimony that appellant would not talk with Oppelt had been stricken. The trial court denied appellant's motion for a mistrial, concluding no prosecutorial misconduct occurred.

(2) *Analysis.*

We reject appellant's claim that the prosecutor committed misconduct when commenting about consciousness of guilt during opening argument. In *People v. Hill* (1998) 17 Cal.4th 800, our Supreme Court stated, " 'The applicable federal and state standards regarding prosecutorial misconduct are well established. " 'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' ' ' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' ' ' [Citation.]' [Citation.]" (*Id.* at p. 819.)

"Finally, 'when the [prosecutorial misconduct] claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' [Citation.]" (*People v. Prieto* (2003) 30 Cal.4th 226, 260.)

We have recited the pertinent facts. We conclude there is no reasonable likelihood that the jury construed or applied the complained-of remarks in an objectionable fashion or as referring to appellant or the fact that he would not talk with Oppelt. No prosecutorial misconduct or violation of appellant's constitutional rights occurred.

b. *The Prosecutor's Use of a Drawing of a Scale During Opening Argument.*

(1) *Pertinent Facts.*

After the prosecutor's opening argument, appellant, outside the presence of the jury, indicated as follows. Prior to jury argument, the court asked appellant if he had reviewed the prosecutor's slides that the prosecutor was intending to use in his Powerpoint presentation. The prosecutor had indicated that none of the slides would be a problem. However, although appellant had not mentioned it during the prosecutor's opening argument, one of the slides presented a major problem and the court needed to admonish the jury.

According to appellant, the problem pertained to the prosecutor's use of a slide reflecting a drawing of a balancing scale. The drawing, reflected in Court's exhibit No. 2, depicted the following. The exhibit was entitled "Weighing Evidence," and below these words was a drawing of a balancing scale. The weighing pan on the right side of the scale was designated "People" and itemized the following alleged evidence: "Positive ID by 3," "Captured on video," "Seen with gun by 2 wits," "Seen acting aggressive and calling 'Vineland Boys' by 3 witnesses," "Admitted crime to his cousin." (Court's exhibit No. 2.)² The weighing pan on the left side of the scale was designated "Defense" and reflected one item of alleged evidence, i.e., "Attack eyewitnesses."

The "People's" pan was essentially resting near the base of the balancing scale. The "Defense" pan was suspended about halfway in the air. Although Court's exhibit no. 2 was marked for identification, it does not reflect it was admitted in evidence.

(2) *Analysis.*

Appellant claims the prosecutor's use of the above mentioned exhibit during opening argument "effectively told the jury that appellant had a duty to present evidence to outweigh the evidence produced by the prosecution, thereby improperly shifting the burden of proof to appellant and relieving the prosecution of its burden to prove the offense beyond a reasonable doubt." We disagree.

The exhibit did not expressly refer to a defense duty to present evidence, a requirement that said defense evidence outweigh the People's evidence, or the burden of proof. Nor is there any reasonable likelihood that, during the prosecutor's jury argument, the jury construed or applied the complained-of representations in the exhibit in an objectionable fashion or as referring to any such defense duty or requirement, or as referring to the burden of proof. Appellant presented evidence at trial, and the exhibit merely suggested how conflicting evidence should be weighed. No prosecutorial misconduct or violation of appellant's constitutional rights occurred.

² Respondent concedes a copy of the exhibit is attached to appellant's opening brief.

3. *Appellant Was Entitled to Additional Precommitment Credit.*

Appellant was arrested on April 12, 2006, and remained in custody until the court sentenced him on May 15, 2008, a total of 765 days, inclusive. However, the trial court awarded appellant only 756 days of custody credit. Respondent concedes appellant is entitled to nine more days of custody credit pursuant to Penal Code section 2900.5, subdivision (a).³ (*People v. Bravo* (1990) 219 Cal.App.3d 729, 731; *People v. Smith* (1989) 211 Cal.App.3d 523, 527.) We will modify the judgment accordingly.

DISPOSITION

The judgment is modified by adding nine additional days of custody credit pursuant to Penal Code section 2900.5, subdivision (a), resulting in a total precommitment credit award of 765 days and, as so modified, the judgment is affirmed. The trial court is directed to forward to the Department of Corrections an amended abstract of judgment reflecting the above modification.

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KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.

³ There is no dispute that, since appellant was convicted of murder, he is not entitled to Penal Code section 4019 conduct credit. (Pen. Code, § 2933.2, subds. (a), (c).)